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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 506

ASHTON BRYAN JONES,

Petitioner,

—v.—

STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above entitled case April 9, 1964, *infra*, p. 12a, rehearing of which was denied on April 21, 1964, *infra*, p. 13a.*

Citation to Opinion Below

The opinion of the Supreme Court of Georgia is reported at —— Ga. ——, 136 S. E. 2d 358 (1964), and is set forth in the Appendix hereto, *infra*, pp. 1a-11a.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered April 9, 1964, *infra*, p. 12a. Motion for rehearing was denied by the Supreme Court of Georgia on April 21, 1964, *infra*, p. 13a.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below and

* On July 8, 1964, Mr. Justice Goldberg signed an order extending petitioner's time for filing petition for writ of certiorari to and including September 18, 1964.

asserting here deprivation of rights secured by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following statutes of the State of Georgia:

> GA. CODE ANN. §26-6901. *Interfering with religious worship.*—Any person who shall, by cursing or using profane or obscene language, or by being intoxicated, or otherwise indecently acting, interrupt, or in any manner disturb a congregation of persons lawfully assembled for divine service, and until they are dispersed from such place of worship, shall be guilty of a misdemeanor.
>
> GA. CODE ANN. §24-102. *When judicial officer disqualified.*—No judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission shall sit in any cause or proceeding in which he is pecuniarily interested, nor preside, act, or serve, in any case or matter, when such judge is related by consanguinity or affinity to any party interested in the result of the case or matter, within the sixth degree, as computed according to the civil law, and relationship more remote shall not be a disqualification; nor in which he has been of counsel, nor in which he has presided in any inferior judicature, when his ruling or decision is the subject of review, without the consent of all parties in interest: Provided, that in all cases in which the presiding judge of the superior court may have been employed

as counsel before his appointment as judge, he shall preside in such cases if the opposite party or counsel agree in writing that he may preside, unless the judge declines so to do: and Provided further that no judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission shall be disqualified from sitting in any cause or proceeding because of the fact that he is a policyholder or is related to a policyholder of any mutual insurance company which has no capital stock. But nothing in the last proviso shall be construed as applying to the qualifications of trial jurors.

Questions Presented

Whether petitioner's Fourteenth Amendment right to due process of law is violated:

1) by a Georgia statute which effectively prohibits advocacy of church desegregation under a broad and indefinite proscription of "interfering with religious worship"?

2) by a decision of the Georgia Supreme Court that under Georgia law personal bias and prejudice of the trial judge toward the accused are never grounds for disqualification?

Statement

Petitioner, Reverend Ashton Bryan Jones, a 67-year-old ordained white minister, attempted to attend the First Baptist Church in Atlanta, Georgia with Negro companions. He was arrested and convicted of violating Ga. Code Ann. §26-6901, "interfering with religious worship."

Events of Sunday Morning, June 30, 1963

At about 10:00 A.M. on June 30, 1963 (R. 365) petitioner (R. 210, 211), together with a white girl and a Negro boy, arrived at the Fourth Street entrance of the First Baptist Church (R. 364) to attend the morning service (R. 233). Petitioner and his companions were in ordinary dress (R. 119, 181) but Reverend Jones was informed by an usher that the main auditorium was open only to him, and not to his Negro companion (R. 365), the church's policy being to seat "other than white people" in a lower, overflow auditorium (R. 258, 365).

Reverend Jones refused to enter the church without the Negro youth (R. 368-369) and remained in the vestibule while people entered, asking them not to worship on a segregated basis (R. 369):

> I smilingly said to them, were you coming in to worship in a segregated church, you see people out there wanting to come in, certainly you must be trying to worship a segregated God.

There is a conflict in the testimony concerning petitioner's conduct while in the vestibule. Mr. H. E. Watts, Chairman of the Hospitality Committee for the First Baptist Church (R. 223) testified that he addressed the entering congregation in a "coarse and raucous voice" (R. 223). Reverend Jones, however, testified that his tone was conversational:

> It was about the same as I am testifying now, I don't think it was any louder, I didn't even raise my voice any louder as I made the comment to the people, some of them, that I felt would accept the comment in the manner and spirit in which I was making it—that this is a segregated church, don't you know this is not right.... (R. 373).

After attempting and failing to gain admission at the Peachtree entrance (R. 371), petitioner and his companions sat down on the church steps to protest the exclusion, and to pray (R. 315, 372). They remained on the church steps until the congregation had left (R. 379). Once again there is a discrepancy in the testimony concerning the cause and the nature of the disturbance which ensued. Taylor Washington, the Negro companion of petitioner, testified that petitioner was accosted by an usher who said: "You're the minister that has been in jail about these sit-in demonstrations" (R. 306), and who then proceeded to drag petitioner, an elderly man (R. 364), by the leg, down the stairs (R. 307), tearing his trousers[1] (R. 309) and causing petitioner to cry out "help police" (R. 308). Police had been observing the activity from across the street (R. 375, 376).

The same incident is described by Mr. Watts:

> "... one of the ushers just touched him on the elbow, just very deftly as you might touch an old lady helping her across the street, something like that, just touched him on the elbow with his hand and he immediately dropped right down on the steps and sprawled out there and yelled, help, help" (R. 224).

Petitioner testified to a second attack by an usher as he was stepping onto church property (R. 377-378) after having chatted with the policemen observing from across the street (R. 376, 377). Petitioner sat down on the ground and eventually the usher ceased dragging him (R. 377, 378). Watts, however, testified that he left the church after hearing a noise outside and discovered petitioner lying alone on the sidewalk, crying for help (R. 224-225).

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[1] A photograph of the torn trousers was introduced into evidence at pp. 429, 450, of the Record.

Events of Sunday Evening

Around 6:00 P.M. that evening (R. 379), petitioner and his companions, dressed appropriately (R. 291) and joined by a young Negro girl (R. 312), returned to the church to attend the evening service (R. 313, 380). They were prevented from entering by ushers who blocked the entrances (R. 313, 380). Petitioner and his three companions then moved to the sidewalk where they began to pray (R. 283, 318, 382-383). While thus engaged in prayer, a church deacon unsuccessfully attempted to kick petitioner (R. 319).

After the prayer petitioner and his companions went to the vestibule of the church (R. 286, 384), where they encounntered ushers who pushed them back out. A disinterested witness, Jack D. Worth of Emory University, who was filming the incident for WSB-TV (R. 278, 292) described the occurrence:

> Q. Did anything happen that you wouldn't normally expect to happen on church property? (R. 284)
>
> A. Well, the only thing that you might classify as that, after Reverend Jones and his three companions had entered the building . . . (R. 285).
>
> • • • • •
>
> A. The door opened and the young Negro woman, companion of Reverend Jones, came tumbling out of the door and fell on the steps (R. 286).

The young Negro woman, Miss Smith, testified that she had been pushed by an usher (R. 348, 384). She subsequently returned to the vestibule where Reverend McClain, Pastor of the Church (R. 190), was criticizing the group for its presence at the church and threatening to call the police (R. 386). Reverend McClain then pushed Miss

Smith in the direction of the door (R. 349-350). The group then sat down on the porch of the church (R. 387), read a portion of the scripture (R. 389), and was walking away from the church when two plainclothesmen came and arrested petitioner (R. 390).

The testimony of Mr. Worth concerning petitioner's conduct upon being arrested corresponds with that of the defense. Worth testified that the policemen held petitioner's arms and pulled him away with his heels dragging on the ground (R. 288). At no time did Worth hear petitioner address the policemen loudly (R. 288-289) or begin to walk and then drop to the ground or act violently (R. 295-296). The state's witness, Mr. Bailey, testified that upon being arrested, petitioner began to holler and flail (R. 272). Mr. Worth testified that while observing the incident, he had been threatened by members of the congregation (R. 297-298), and that he had been restrained from taking some pictures (R. 299).

There was no testimony that religious worship had been "interrupted" by petitioner, and the only evidence of "disturbance" was the testimony of Watts and Bailey as to loud noises (R. 224, 256).

Petitioner was indicted by the Grand Jury of Fulton County for the misdemeanor of interrupting and disturbing religious worship in violation of Ga. Code Ann. §26-6901 "by loud talking, shouting, and by sitting on the floor of said Church and by otherwise indecently acting" (R. 1).

In the Superior Court of Fulton County, Georgia, Judge Durwood T. Pye, presiding, petitioner was convicted and sentenced to the maximum misdemeanor sentence: twelve months upon the public works, six months in jail, and a fine of one thousand dollars ($1,000.00) (R. 3, 4). After conviction, bail was set at $20,000.00 (R. 20). Unable to

make bail, petitioner remained in jail for approximately six months (Bill of Exceptions, 1).

On appeal, the Supreme Court of Georgia affirmed petitioner's conviction and sentence in the Superior Court, *infra*, pp. 1a-12a.

How the Federal Questions Were Raised and Decided Below

Before pleading to the indictment, petitioner, relying, *inter alia*, on the Fourteenth Amendment to the Constitution of the United States, filed a "motion to disqualify or recuse" the Superior Court Judge, the Honorable Durwood T. Pye, on the grounds of bias and prejudice (R. 5-6, 43-45). Judge Pye overruled the motion (R. 76). Petitioner assigned this ruling as error in the Supreme Court of Georgia (Bill of Exceptions, 6, 7) but his Fourteenth Amendment claim was rejected by that court, *infra*, pp. 1a-2a:

> Ga. Code Ann. §24-102 provides the circumstances under which a judge of the Superior Court may be disqualified. This Code section does not provide that bias or prejudice is a ground to disqualify him from presiding in the case. The statutory grounds of disqualification contained in this section are exhaustive.

Before trial, petitioner demurred generally (R. 89-90) challenging both the statute under which he was indicted and the indictment as "so vague, indefinite and ambiguous" (R. 8) that they failed to give him reasonable notice of the charges against him and the acts or conduct constituting the crime in violation of the Fourteenth Amendment to the Constitution of the United States (R. 8-9). The general demurrer was overruled (R. 90). After trial, peti-

tioner again challenged the statute as violating the due process clause as:

> . . . so vague, incomplete and indefinite as to be insufficient to place the defendant upon notice of the offense for which he was charged . . . and said statute is so broad and inclusive and devoid of any reasonable standards that it punishes innocent conduct as well as guilty conduct . . . (R. 38).

On appeal to the Supreme Court of Georgia, petitioner asked reversal of his conviction on the basis of vagueness and indefiniteness of the statute and also alleged violation of rights of free speech, expression and association as guaranteed by the Fourteenth Amendment (Bill of Exceptions, 3, 4). The Supreme Court held Ga. Code Ann. §24-102 "satisfies due process requirements," *infra*, p. 4a:

> . . . "Indecently acting" must be taken in the comprehensive sense and include all improper conduct which interrupts or disturbs a congregation of persons lawfully assembled for divine worship. Any person of common intelligence . . . may determine whether the particular acts and conduct charged him with improper conduct, i.e., indecent acting.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's Conviction Under a Vague and Overbroad Statute Violates Due Process of Law as Secured by the Fourteenth Amendment.

Petitioner was convicted for violating Ga. Code §26-6901:

> *Interfering with religious worship.*—Any person who shall, by cursing or using profane or obscene language, or by being intoxicated, or otherwise indecently acting, interrupt, or in any manner disturb, a congregation of persons lawfully assembled for divine service, and until they are dispersed from such place of worship, shall be guilty of a misdemeanor.

Petitioner was not charged with violating the specific prohibitions of the statute, but convicted under the catch-all phrase: "otherwise indecently acting" (R. 459). Such language, unconstitutionally vague and indefinite on its face,[2] is particularly offensive to the requirements of due process when used, as here, to regulate the delicate balance between freedom of speech and protection of the right to worship.

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[2] Compare "unreasonable charges" of *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; "unreasonable" profits of *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; "reasonable time" of *Herndon* v. *Lowry*, 301 U. S. 242; "sacrilegious" in *Joseph Burstyn, Inc.* v. *Wilson*, 303 U. S. 44; "so massed as to become vehicles for excitement" (a limiting interpretation of "indecent or obscene") of *Winters* v. *New York*, 333 U. S. 507; "immoral" of *Commercial Pictures Corp.* v. *Regents of University of N. Y.*, reported with *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587; "an act likely to produce violence" in *Edwards* v. *South Carolina*, 372 U. S. 229; "subversive person" in *Baggett* v. *Bullit*, 377 U. S. 360.

It is clear that petitioner's purpose was to advocate ideas; namely, the evils of segregation and the immorality of Christians who exclude Negroes from worship (R. 369, 426). When free expression is involved, the vice of a vague statute is not only that one cannot predict the conduct which is criminal, cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451, but that the vagueness and breadth of the statute will unduly burden protected speech.[3] The case at bar exemplifies the danger of permitting an indefinite statute to regulate speech.

Examination of the record shows that petitioner quietly addressed members of the church as they entered (R. 369, 373), that any loud noises were cries for assistance when he was under assault (R. 308, 364, 377, 378), and that his lying on the floor was in protest of his being kicked, grabbed, beaten, and dragged down the steps (R. 283, 318, 382-83, 387-89). The evidence most favorable to the state indicates that petitioner threw himself on the floor and shouted without provocation (R. 224, 225). This sweeping statute permits prejudiced and discriminatory state enforcement to hide under such a contested factual dispute.

Regardless of the view one takes of the actual events, conviction under the catch-all phrase "otherwise indecently acting" cannot be sustained, for such language necessarily inhibits exercise of free speech and renders the statute unconstitutionally vague on its face.[4] In appraising the

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[3] See *Thornhill* v. *Alabama*, 310 U. S. 88, 97, 98; *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507; *Smith* v. *California*, 361 U. S. 147; Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67, 80-82 (1960).

[4] Petitioner, moreover, need not prove that his conduct could not be proscribed by a different statute:

> An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the

inhibitory effect of such a statute, "this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U. S. 415, 432.

What are such different factual contexts? Had petitioner limited his protest to a peaceful demonstration outside the church, his activity clearly would be constitutionally protected. See *Edwards* v. *South Carolina*, 372 U. S. 229, but the statute, by its terms and as construed by the courts of Georgia, applies to such protected activity. Moreover, as consistently construed by the Supreme Court of Georgia, "otherwise indecently acting" covers any "improper conduct" which in any manner disturbs religious worship, *infra*, p. 4a:

> [T]he words "indecently acting" must be taken in the comprehensive sense and include all improper conduct which interrupts or disturbs a congregation of persons lawfully assembled for divine worship.

"Improper conduct" seems to be determined solely by the effect of the activity on the congregation:

> "[I]ndecently acting [can] signify any conduct which, being contrary to the usages of the particular class or worshippers interferes with their service, *or* is annoying to the congregation in whole or in part . . ." *Nichols* v. *State*, 103 Ga. 61, 29 S. E. 431 (1897).

In *Nichols* v. *State*, *supra*, the defendant was speaking "between a talk and a whisper" but his conduct was included within the term "indecently acting." In another

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state could not constitutionally have written a different and specific statute covering his activities. . . . *Thornhill* v. *Alabama*, 310 U. S. 88, 96, 98.

case, one who discharged a gun near a church was guilty, apparently, without proof that he intended to disturb worship. *Folds* v. *State*, 123 Ga. 167, 51 S. E. 305 (1905). The statute applies even if only one person is disturbed, *Daniel* v. *State*, 4 Ga. 844, 62 S. E. 567 (1908), and after the congregation has dispersed from the church. *Folds* v. *State, supra; Minter* v. *State*, 104 Ga. 743, 30 S. E. 989 (1898).

Any peaceful protest against segregation outside a segregated church easily falls within these standards. Further confusion is introduced by the Georgia Supreme Court's finding that:

> Any person of common intelligence (and particularly one who claims to be an ordained minister) may determine whether the particular acts and conduct charged him with improper conduct, i.e., indecent acting (*infra*, p. 4a).

What to many may be a decent and honorable exercise of free speech may be considered by others the basest of conduct; what may be indecent and improper to many may fall well within the protections of the Federal Constitution.[5] It is the task of the state, not that of "any person of common intelligence" to draw statutes which strike the balance between individual freedom and needs of the state.

The following facts stare anyone in the face who would seek to protest segregation of churches: Petitioner, a 67-year-old minister, was arrested during such a protest and convicted on highly conflicting evidence of "otherwise indecently acting." He was sentenced to one year at hard labor, six months in jail, and a $1,000.00 fine, the maximum

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[5] Compare conduct in *Herndon* v. *Lowry*, 301 U. S. 242; *Hague* v. *C. I. O.*, 307 U. S. 496; *Terminiello* v. *Chicago*, 337 U. S. 1; *Edwards* v. *South Carolina*, 372 U. S. 229.

for misdemeanor offenses (R. 3, 4). After conviction he was subjected to enormously high bail provisions and was forced to serve six months while his constitutional arguments were being heard in state courts.

In light of this vaguely written and broadly applied Georgia Statute, one exercising the right to free speech must determine at the peril of harsh criminal prosecution and costly appeal the reach of that right. Who now, in Georgia, or any other state which has a similar law, would dare to engage in any public protest of segregation of religious institutions? To permit such an indefinite statute to stand is to nullify, in Georgia, freedom of speech which strikes at so pernicious a social evil.

II.

Petitioner's Conviction Was Affirmed Also on the Ground That Personal Bias and Prejudice of the Trial Judge Against Him Was Not a Basis for Disqualification of the Judge in Violation of His Right to Due Process of Law Under the Fourteenth Amendment.

A. The Supreme Court of Georgia Applied an Improper Standard in Holding Bias and Prejudice Was Not a Ground for Disqualification of the Trial Judge.

Before pleading to the merits, petitioner moved to disqualify Judge Durwood T. Pye of the Superior Court of Fulton County, Georgia, on the ground that, by reason of "repeated denunciation of the Negro race in general and the defendant in particular" and "an extraordinary and prejudicial interest against the defendant," the judge could not give petitioner a fair and impartial trial.[6]

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[6] The motion to disqualify or recuse reads as follows:

1. Defendant shows that because of a repeated denunciation of the Negro race in general and the defendant in particu-

The motion to disqualify was submitted at the opening of petitioner's trial (R. 43-45). After counsel presented

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lar by the Honorable Durwood T. Pye, Judge in this case, he, the said Judge Pye, cannot impartially try said case on its merits.

2. That the said Judge Pye has manifested an extraordinary and prejudicial interest against the defendant generally and specifically in the manner that he has brought this and other defendants to trial before him, in that:

a. That the said Judge Pye took it upon himself, contrary to the normal and accepted practice, to solicit from the Chief of Police and/or others the names of this and other defendants who had been charged with misdemeanor offenses relating to peaceful protest against discriminatory practices, policies, customs and acts by private persons public officials and others as relates to the rights, privileges and immunities of Negro citizens in the City of Atlanta, Fulton County, Georgia.

b. That this defendant was duly bound over from the Municipal Court of Atlanta to the Criminal Court of Fulton County as is customarily done for alleged misdemeanants; that defendant's case was being processed according to standard practice in said court; that according to standard practice in said court, defendant would have been scheduled for trial as the dockets and calendars of said court would permit.

c. That there are at least one hundred prisoners in the Fulton County Jail presently awaiting trial.

d. That ordinarily the Grand Jury is empaneled and charged by the presiding judge of the term.

e. That contrary to practice and custom the said Judge Pye caused the misdemeanor charges against the defendant to be presented by the Solicitor General of Fulton County to the said grand jury which was empaneled at his instance.

f. That in charging said grand jury the said Judge did further manifest that his basic dislike and prejudice to Negroes by alluding to some of them as "savages." Further, in his charge to said grand jury he made extended remarks concerning the crime rate among Negroes without making any constructive suggestions, or asking for any from the grand jurymen; he only suggested punishment "far more severe than at present."

g. Said Judge Pye further expounded at great length in his charge about "property rights," and further sought to construe the Act approved February 18, 1960, and set forth in Georgia Laws 1960, page 142, drawing his own conclu-

the motion, Judge Pye proceeded immediately,[7] without taking testimony, to read it into the record by paragraphs, state his reasons for denying the truth of the allegations[8] (R. 45-84), and deny the motion (R. 76).[9] After overruling the motion, the court cited petitioner's counsel for contempt, charging presentation of the motion was "an insult done to the court" (R. 84) and ordered them to show cause why they "should not be dealt with from the standpoint of contempt and otherwise as lawyers" (R. 84, 85). Counsel would have to "convince the court that they believe the

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sion, when said Act has not yet been construed by the highest court of this state.

h. Said Judge Pye further charged that said Act has been "flouted, defied and violated, that these violations have been frequent and repeated, and the results of combinations and conspiracies." That said language to the grand jury was prejudicial in the manifestation of the prejudice of the said trial judge when made to a grand jury prior to the presentment of the facts relating to defendant's case and those of others similarly charged.

3. Defendant shows that the acts of said trial judge as alleged in paragraph 2 above, are in derogation of the due process and equal protection clauses of Article I, Section I, Paragraph 3 of the Georgia Constitution and Section I of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, defendant prays that the Honorable Durwood T. Pye disqualify himself in this case and refer it back to the presiding judge of this Court.

[7] Shortly after the court addressed itself to the allegations of the motion to disqualify, petitioner's counsel sought to have the jury leave the room but Judge Pye refused on the ground that he had already begun to consider the motion to disqualify (R. 48).

[8] The judge conceded, however, after checking court records at the request of petitioner's counsel, that when ruling on a motion to disqualify brought some years earlier by other counsel in another case that he had stated that he had "strong personal views against mongrelization of the races" (R. 81, 77-80).

[9] Judge Pye placed into the record a letter to the Chief of Police and the reply of the Chief, as well as the charge to the grand jury which indicted petitioner, reference to which was made in the motion to disqualify.

court has any prejudice against them, against any Negro, that they honestly believe that the court cannot afford a fair trial for any man. . . . " (R. 85). At this point, counsel asked for a continuance until after the hearing on the contempt citation, because under threat of contempt they could not "appropriately and properly" represent their clients (R. 85-86), but the motion was overruled (R. 86).

On appeal, despite petitioner's express reliance on his Fourteenth Amendment right to an impartial tribunal, the Supreme Court of Georgia held that Ga. Code Ann. §24-102[10] provides the only circumstances under which a Judge of the Superior Court may be disqualified. Petitioner's motion to disqualify was held properly overruled because: "prejudice or bias of the judge which is not based on an interest either pecuniary or relationship to a party affords no legal ground of disqualification," *infra*, pp. 1a-2a.

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[10] §24-102. *When judicial officer disqualified.*—No judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission shall sit in any cause or proceeding in which he is pecuniarily interested, nor preside, act, or serve, in any case or matter, when such judge is related by consanguinity or affinity to any party interested in the result of the case or matter, within the sixth degree, as computed according to the civil law, and relationship more remote shall not be a disqualification; nor in which he has been of counsel, nor in which he has presided in any inferior judicature, when his ruling or decision is the subject of review, without the consent of all parties in interest: Provided, that in all cases in which the presiding judge of the superior court may have been employed as counsel before his appointment as judge, he shall preside in such cases if the opposite party or counsel agree in writing that he may preside, unless the judge declines so to do: and Provided further that no judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission shall be disqualified from sitting in any cause or proceeding because of the fact that he is a policyholder or is related to a policyholder of any mutual insurance company which has no capital stock. But nothing in the last proviso shall be construed as applying to the qualifications of trial jurors.

This holding that personal or racial bias against an accused is in no circumstances sufficient to disqualify a trial judge is a clear violation of the due process clause of the Fourteenth Amendment. "No matter what the evidence was against him" petitioner "had the right to have an impartial judge." *Tumey* v. *Ohio*, 273 U. S. 510, 535.

The occasions which give rise to bias in a trial judge cannot be arbitrarily limited to "interest either pecuniary or relationship to a party" as provided by Ga. Code Ann. §24-102, *infra*, pp. 1a-2a. In *Tumey, supra*, the Fourteenth Amendment required disqualification of a mayor who also served as trial judge "because of direct pecuniary interest in the outcome and *because of his official motive to convict and to graduate the fine to help the financial needs of the village.*" (Emphasis supplied.) But in *Re Murchison*, 349 U. S. 133, the court found an "interest in the outcome" sufficient to disqualify when the same official served as "one-man grand jury," out of which contempt charges arose, and as the trial judge of those charges. The Court found that the Fourteenth Amendment requires disqualification whenever a judge's "interest in the outcome" would work "actual bias in the trial of cases." *Re Murchison*, 349 U. S. at 136. The "interest" which disqualifies "cannot be defined with precision," *ibid.* "[C]ircumstances and relationships must be considered," *ibid.*[11]

Petitioner's Fourteenth Amendment right to an impartial trial, therefore, cannot be restricted arbitrarily to the "interests" set forth in Ga. Code Ann. §24-102. *Tumey* v. *Ohio, supra*, and *Re Murchison, supra*, demonstrate with respect to a trial judge (*Irvin* v. *Dowd*, 366 U. S. 717, and *Rideau* v. *Louisiana*, 373 U. S. 723, with respect to the trial

[11] "Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." *Tumey* v. *Ohio*, 273 U. S. 510, 532.

jury) that "impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula," *United States* v. *Wood*, 299 U. S. 123, 145.

Petitioner sought to disqualify the trial judge because of a racial and personal bias sufficient to deny him a fair and impartial trial. The courts of Georgia refused to consider these allegations, because Ga. Code Ann. §24-102 "does not provide that bias or prejudice is a ground to disqualify" a trial judge, *infra*, pp. 1a-2a. Applying a standard of disqualification impermissible under the Fourteenth Amendment, the Supreme Court of Georgia has affirmed petitioner's conviction, in violation of his right to due process of law. *Rogers* v. *Richmond*, 365 U. S. 534.

B. Petitioner Was Entitled to a Hearing on the Motion to Disqualify or a Trial of the Charges Against Him Before Another Judge.

Had petitioner alleged bias and prejudice sufficient to deny him an impartial trial in a federal court, another judge would have been designated immediately to try his case. 28 U. S. C. §144; *Berger* v. *United States*, 255 U. S. 22, 36:[12]

> To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section

[12] *Berger* v. *United States*, 255 U. S. 22, illustrates the gap between the Georgia rule applied to foreclose any consideration of petitioner's claim of bias and standards of fairness which prevail in federal courts. In *Berger*, the Court held that under Section 21 of the Judicial Code of 1911 (substantially carried forth in 28 U. S. C. §144) the mere filing of an affidavit in the manner provided showing "objectionable inclination or disposition of the Judge," 255 U. S. at 35, sufficiently "withdraws from the presiding judge a decision upon the truth of the matters alleged," 255 U. S. at 36, and acts to transfer the litigation to another judge.

> is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exists, it has worked its evil and the judgment of it in a reviewing tribunal is precarious. It goes there by presumptions and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

Federal law withdraws from the presiding judge a decision upon the truth of the matters alleged in a motion to disqualify. No less a standard should apply under the Fourteenth Amendment. No judge should be permitted to try his own case, cf. *Re Murchison,* 349 U. S. 133. "The risk to impartial justice is too great," *Sacher* v. *U. S.,* 343 U. S. 1, 17 (Mr. Justice Black dissenting).[13]

Long ago, this Court recognized that where "the issue between the judge and the parties had come to involve marked personal feeling that would not make for an impartial and calm judicial consideration," the presiding judge should properly withdraw. *Cooke* v. *United States,* 267 U. S. 517, 539. See also Mr. Justice Frankfurter dissenting in *Sacher* v. *United States,* 343 U. S. at 30-33. In this case the record demonstrates the intensity of feeling generated by the motion to disqualify (R. 84-85, 87-88). Judge Pye took personal affront at the motion and immediately after overruling it cited counsel for contempt because they had asked him to recuse himself. Under the Fourteenth Amendment, the right to a fair and impartial judge is of such consequence that trial of the charges against an accused alleging bias or, at least, determination of the motion to disqualify should be withdrawn from the presiding judge.

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[13] This case does not involve, as did *Sacher,* the well-established power of courts to punish disruptive conduct occurring in open court.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion

(Decided: April 9, 1964)

IN THE

SUPREME COURT OF GEORGIA

ASHTON BRYAN JONES,

—v.—

STATE.

ALMAND, Justice. Ashton B. Jones upon his conviction of violating Code Ann. §26-6901 (interfering with religious worship) was sentenced by the court. His motion for a new trial was overruled. Error is assigned on the order denying him a new trial. Error is also assigned on (a) the refusal of the trial judge to disqualify himself from presiding in the case; (b) the order dismissing on motion of the State the defendant's plea in abatement; (c) the orders overruling the general and special demurrers to the indictment; and (d) the order overruling the defendant's motion in arrest of judgment.

1. *Motion to disqualify.* The defendant before pleading to the merits moved to disqualify the trial judge on the ground that he, by reason of bias and prejudice, could not give him a fair and impartial trial. *Code Ann.* §24-102 provides the circumstances under which a judge of the superior court may be disqualified. This Code section does not provide that bias or prejudice is a ground to disqualify him from presiding in the case. The statutory grounds of dis-

qualification contained in this section are exhaustive. *Blakeman* v. *Harwell*, 198 Ga. 165 (31 SE 2d 50). "Alleged prejudice or bias of a judge, which is not based on an interest either pecuniary or relationship to a party within a prohibited degree, affords no legal ground of disqualification." *Elder* v. *Camp*, 193 Ga. 320 (18 SE 2d 622). See also *Moore* v. *Dugas*, 166 Ga. 493 (143 SE 591).

2. *The plea in abatement.* The plea alleged that the indictment under Code §26-6901 was being applied so as to deny the defendant due process of law and equal protection of the law under the Constitution of Georgia (Code Ann. §2-103) and the Fourteenth Amendment to the Federal Constitution in that "the said statute is being applied so as to perpetuate a scheme of racial discrimination in places of public worship within the City of Atlanta, Fulton County, Georgia, which has long existed under State sanction through legislative enactments, recognized customs and usages, and which has been aided and abetted by the discriminatory enforcement and application of the said statute." The State moved to dismiss the plea on the grounds that all the allegations contained in the plea go to the merits of the case and are not the proper subject matter for a plea in abatement. This motion to dismiss was sustained.

Pleas in abatement are dilatory pleas. They must be strictly construed, certain in intent and leave nothing to be suggested by intendment. Every inference must be against the pleader. *Meriwether* v. *State*, 63 Ga. App. 667-(1) (11 SE 2d 816). The indictment charges the defendant with disturbing divine worship by the doing of certain acts. There is no allegation of the absence of such acts before the grand jury or that the indictment was returned solely by the grand jury "to perpetuate a scheme of racial dis-

crimination in places of public worship." "It has never been the practice in this State to go into an investigation to test the sufficiency of the evidence before the grand jury." *Powers* v. *State*, 172 Ga. 1-(3) (157 SE 195).

It was not error to dismiss the plea.

3. *The demurrers to the indictment.* The general demurrers. Code §26-6901 provides: "Any person who shall, by cursing or using profane or obscene language, or by being intoxicated, or otherwise indecently acting, interrupt, or in any manner disturb, a congregation of persons lawfully assembled for divine service, and until they are dispersed from such place of worship, shall be guilty of a misdemeanor." The indictment charged the defendant with the offense of a "misdemeanor (Sec. 26-6901) for that said accused, in the County of Fulton and State of Georgia, on the 30th day of June, 1963 with force and arms, said accused being at and on the grounds of the First Baptist Church of Atlanta, did interrupt and disturb a congregation of persons then and there lawfully assembled for divine service at said church, by loud talking, shouting, and by sitting on the floor of said church and by otherwise indecently acting contrary to the laws of said State, the good order, peace and dignity thereof."

(a) The defendant challenges the statute under which he was indicted (Code Ann. §26-6901) on the ground that the statute is so vague, indefinite and ambiguous that it wholly fails to give the defendant notice of the act and conduct which constitutes a violation of said statute as is required by the due process clauses of the State Constitution and the Fourteenth Amendment to the Federal Constitution.

Statutory language in defining a criminal offense which conveys a definite meaning as to proscribed conduct when measured by common understanding and practice satisfies due process requirements. *United States* v. *Petrillo*, 332 U. S. 1. The statute under consideration proscribes the interruption or disturbance of a congregation of persons assembled for divine service in one of five different ways. The defendant under this indictment is put upon notice that he at a certain day at a named church did by "loud talking, shouting and by sitting on the floor of said church and by otherwise indecently acting" interrupt and disturb a congregation of persons assembled for divine worship at said church. This court in *Folds* v. *State*, 123 Ga. 167 (51 SE 305) held that the words "indecently acting" must be taken in the comprehensive sense and include all improper conduct which interrupts or disturbs a congregation of persons lawfully assembled for divine worship. Any person of common intelligence (and particularly one who claims to be an ordained minister) may determine whether the particular acts and conduct charged him with improper conduct, i.e., indecent acting. See *Watson* v. *State*, 192 Ga. 679 (16 SE 2d 426); *Farrar* v. *State*, 187 Ga. 401-(2) (200 SE 803), and *Clark* v. *State*, 219 Ga. 680 (135 SE 2d 270).

It was not error to overrule this ground of the general demurrer:

"(b) The indictment was demurred to on the grounds (1) that it did not charge any offense under the law; (2) that the allegations in the indictment were insufficient to charge the defendant with any offense under any law of the State and, (3) that the allegations in the indictment are so vague, indefinite and ambiguous that they wholly fail to give the defendant reasonable and adequate notice, as required by the due process clauses of the State Constitution and the Fourteenth Amendment to the Federal Constitution.

Laying the indictment by the side of the statute (Code §26-6901) discloses that the defendant is charged with the offense prohibited by the statute and that he is apprised with reasonable certainty of the nature of the charge, *Glover* v. *State,* 126 Ga. 594 (55 SE 592), and that the statute is sufficient to withstand a general demurrer, *Ruff* v. *State,* 17 Ga. App. 337 (86 SE 784).

The charge that the allegations in the indictment are so vague, indefinite and ambiguous as not to meet the requirements of due process is controlled by the ruling in division 3(a) above.

4. *Special demurrers.* Ground 1 asserts that the indictment fails to allege that any person or persons were disturbed or give the name of any person who was disturbed. Grounds 2 and 3 allege that the words "by loud talking, shouting and by sitting on the floor of said church and by otherwise indecently acting" are too vague and indefinite, and insufficient to enable the defendant to prepare his defense and that there was no allegation that the "loud talking" was either profane, abusive, unreasonable or willful. Ground 4 alleges that the words in the indictment "by otherwise indecently acting" are vague and insufficient to put defendant on notice of the nature and character of his acts. Ground 5 asserted that the indictment fails to state the State and county of defendant's residence.

The court overruled all of the special demurrers except ground 4 which it sustained, and the words "and by otherwise indecently acting" were stricken from the indictment. Error is assigned on the overruling of the other demurrers.

This court in considering the sufficiency of an indictment under Code §2 3901 in *Minter* v. *State,* 104 Ga. 743, 748 (30 SE 989) said: "The terms of the statute upon which this presentment is founded so distinctly individuate the

offense which it defines, that the use of such terms in charging the offense in the presentment sufficiently notified the accused of what he was called upon to answer. The gist of the offense is the *disturbance* of a congregation lawfully assembled for divine service; and the manner and means, or the particular acts, by which the disturbance of such congregation may be effected are set out in the statute; and a general allegation that the disturbance was caused by such acts is all that is necessary, without entering into details." See also *Folds* v. *State*, 123 Ga. 167; *Brown* v. *State*, 14 Ga. App. 21-(4) (80 SE 26).

It was not error to overrule the four special demurrers.

5. *Motion in arrest of judgment.* The first ground of the motion asserted that there was no valid and sufficient indictment. Our ruling in Division 3 of this opinion forecloses any further discussion of this ground. The second ground alleged that Code 26-6901 was violative of the due process clauses of the State Constitution and the Fourteenth Amendment to the Federal Constitution. Our ruling in Division 3(a) of this opinion settles this ground.

The third ground asserts that when the court struck the words "and by otherwise indecently acting" from the indictment, it materially amended the indictment in derogation of the due process clauses of the State Constitution and the Fourteenth Amendment to the Federal Constitution, and the indictment as amended failed to charge an offense under the laws of Georgia.

As pointed out in our rulings on the special demurrers the court sustained the special ground of the defendant's demurrer and on his motion struck the words "by otherwise indecently acting" from the indictment. The court struck those words from the indictment as "constituting surplusage, in order that the jury might not be confused." This the

court had the right to do and such action did not render the whole indictment void. *Brooks* v. *State*, 178 Ga. 784-(3) (175 SE 6); *Patton* v. *State*, 59 Ga. App. 871(2) (2 SE 2d 511). This is especially true where the court's action was at the defendant's request. *Ralston* v. *Cox*, 123 F2d 196, cert. denied 315 U. S. 796 (62 SC 488, 86 LE 1197).

The indictment with the words "and by otherwise indecently acting" stricken was sufficient to charge an offense under Code §26-6901. *Folds* v. *State*, 123 Ga. 167, *supra*.

The motion in arrest was properly overruled.

6. *Motion for a new trial.* The motion consists of the general grounds and 14 amended grounds.

(a) Exceptions to instructions to the jury. The court after reading Code §26-6901 to the jury charged that if they found beyond a reasonable doubt that loud talking or sitting on the floor or shouting be shown, provided it was such that disturbed persons assembled for divine service, such would constitute indecent acting within the meaning of the law.

This charge is not subject to the exception that it conveyed an erroneous impression or inference. The charge was in harmony with the statute and with this court's definition of "indecent acting" in *Folds* v. *State*, 123 Ga. 167, *supra*.

(b) The court charged the jury that though the indictment charged that the offense was committed with force and arms, it would be sufficient if the State should prove the remaining allegations of the indictment. The ground of the exception is that it erroneously conveyed to the jury the idea that the defendant had used force and violence. It was not error for the court to inform the jury that it was

not necessary to prove this formal phrase of the indictment. See *Pitts* v. *State*, 219 Ga. 222 (132 SE 2d 649).

(c) The court instructed the jury that if the state proved that the accused did interrupt or disturb—either one was sufficient to support the allegation in the indictment that he did interrupt and disturb.

This charge is not subject to the objection that it was erroneous and harmful.

(d) The court instructed the jury that if the defendant did the acts alleged in the indictment for the purpose of causing the church to change its rules and practice to conform to those of the defendant's liking, this would not constitute any defense.

This instruction, it is alleged, was in derogation of the defendant's right of free speech and association guaranteed by the State and Federal Constitutions.

The statute under which the defendant was being prosecuted does not make it an offense for one to speak in a church service. The gist of the offense is the interruption or disturbance of the congregation while engaged in divine service. The statute may be violated not only by the spoken word (cursing, profane or obscene language) but by indecent acting. One might remain mute, yet by improper conduct interrupt or disturb the service.

The constitutional right of *one* to freedom of speech is counterbalanced by the right of the *many* to their constitutional freedom in the practice of their religion. Neither occupies a preferred position in the Constitution.

The instruction was not error.

(e) Grounds 5, 6 and 7 will be considered together. (5) The court charged the jury that a church has the right to establish its own practice and rules for the admission and

seating of persons and if one refused to comply with the rules the church authorities had the right to use reasonable force to evict him. (6) The court charged the jury that if the defendant disagreed with the rules and practices of the church and engaged in loud talking, shouting and sitting on the floor to induce the church to change its rules, his desire to cause the church to change its rules would not constitute any defense. (7) The court charged that the jury was not concerned with the question of segregation or integration or with the correctness or propriety of any rule or practice of the church. These charges were objected to as being (5) injurious and prejudicial; (6) erroneous and incorrect and (7) harmful because the jury should have been allowed to consider the question as to whether the church was practicing racial segregation.

From the testimony of the defendant it clearly appears that he went to the church for the purpose of getting the church authorities to change its rules and practices as to seating persons. The evidence authorized these instructions.

(f) The defendant alleges error because the court read to the jury the indictment without reading the three words, "otherwise indecently acting," which had been stricken by the court on motion of the defendant.

There is no merit to this contention. It was proper for the court to read the indictment as it stood after the elimination of these words.

7. Glenn Bailey testified that he was a member of the First Baptist Church and was in the church sanctuary for the morning service of June 30, 1963 and heard a man hollering and that the voice was coming from the front of the church. Defendant moved to rule out this testimony be-

cause the witness did not identify the defendant as the one who hollered. The motion was overruled. There was other testimony that the hollering was done by the defendant. It was not error to overrule the motion.

8. On cross-examination of the witness the court sustained the objection of the State's counsel to the question "Do you know that as a matter of fact the disorderly conduct charge against the defendant was dismissed?" The defendant alleges error on the ground that "the movant was unable to solicit from the witness relevant facts within his own knowledge which would have exculpated the movant" and thereby limited the scope of defendant's cross-examination.

What action took place in another court upon a different charge was irrelevant and immaterial. The action of the court in confining counsel to the issues of the case on trial does not abridge counsel's right to a thorough cross-examination. *Pulliam* v. *State*, 196 Ga. 782 (28 SE 2d 139).

9. Ground 11 alleges error in the court, over objection, permitting the State's counsel on cross-examination of the defendant to question the defendant on his acts and conduct at other places in Atlanta.

It appears from the testimony of the defendant that he first brought into the case incidents of picketing, "sitting in" and "lying in" at other places in Atlanta. It was not error to permit State's counsel to cross-examine the defendant as to these other incidents.

10. Grounds 12 and 13 assign error on the court's overruling defendant's motion for a directed verdict of acquittal. It is never error to refuse to direct a verdict of acquittal. *Baugh* v. *State*, 211 Ga. 863 (89 SE 2d 504).

11. The final special grounds complain that the court's sentence of 12 months upon the public works, 6 months in jail and a $1,000 fine was arbitrary, capricious, unreasonable and violative of the constitutional provisions for due process of law, and fair and impartial trial, and was excessive.

The sentence imposed was within the limits provided by law. Being not greater than the maximum sentence provided by law it is not excessive. *Godwin* v. *State*, 123 Ga. 569 (51 SE 598).

12. The verdict is fully supported by the evidence and the general grounds were properly overruled.

Judgment affirmed. All the Justices concur.

Judgment

(Decided April 9, 1964)

IN THE

SUPREME COURT OF THE STATE OF GEORGIA

ASHTON BRYAN JONES,

—v.—

THE STATE.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Ashton Bryan Jones v. *The State.*

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur.

Denial of Rehearing

(Decided April 21, 1964)

IN THE

SUPREME COURT OF GEORGIA

ASHTON BRYAN JONES,

—v.—

THE STATE.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Ashton Bryan Jones v. *The State.*

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it hereby be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No._____

ASHTON BRYAN JONES,

Petitioner

v.

STATE OF GEORGIA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the petition for writ of certiorari be denied, giving reasons herein for this position.

CITATION TO OPINION BELOW

In addition to the citation of 136 S.E. 2d 358, given in the petition, the opinion of the Supreme Court of Georgia is reported at 219 Ga. 848.

JURISDICTION

The jurisdiction of this Court is conceded, but we point out that the petitioner is here asserting a "depri-

vation of right," to wit: Deprivation of advocacy and of freedom of speech, which was not asserted in the Georgia courts.

QUESTIONS PRESENTED

1. By his demurrer to the indictment (R. 8-9), petitioner asserted that the Georgia statute, Code sec. 26-6901 (Interfering with religious worship) violated "the due process clause . . . of section 1, Fourteenth Amendment, Constitution of the United States" in that it "is upon its face so *vague,* indefinite and ambiguous that said statute wholly fails to give the defendant adequate *notice* of the acts and conduct which constitute a violation of said statute." This was again asserted in his Motion in arrest of judgment, filed subsequent to the trial. (R. 38) Neither of these pleadings asserted any claim that his right of freedom of speech or his right of advocacy was prohibited or curtailed by said Statute. It seems, therefore, that the first of the "Questions" set forth by Petitioner under "Questions Presented" is not properly involved, since the petitioner now seeks to have this Court decide whether said Statute "effectively prohibits advocacy of church desegregation." The Supreme Court of Georgia has not considered or decided whether the Georgia statute in question "effectively prohibits advocacy of church desegregation," but considered the challenge to the statute upon the ground that it was "so vague, indefinite and ambiguous that it fails to give the defendant notice of the act and conduct which constitutes a violation." (219 Ga. 848, on page 850.)

2. As to Question No. 2, we believe that the petition states it more broadly than it should be stated. The

question should be: whether petitioner's Fourteenth Amendment right to due process of law was violated by the trial judge overruling petitioner's motion to disqualify him in this specific case.

STATEMENT

To the "statement" in the petition for certiorari, we believe the following items of evidence should be added:

Events of Sunday Morning

(a) Rev. J. A. Langley (R. 187 et seq.) testified that he was an associate minister of the First Baptist Church in Atlanta, and was attending divine worship there on the last Sunday in June, 1963; that he and other worshippers underwent a disturbance during the morning service; that he and other worshippers were standing in the vestibule, with bowed heads, while the morning prayer was being offered, when he "heard some screams and shouts right outside the front door"; that the volume of that sound was heard very intensely in the vestibule where they were standing bowed in prayer, and even in the sanctuary where people were sitting (R. 188); that he then "went to try to find out what the source of it was" and went "to the front of the church" where he "saw Mr. Jones (the defendant) sitting at that time on the front steps (R. 189); that two people were sitting there with him; that while he and the others were in the vestibule they were hearing the prayer, by the pastor, Dr. McClain, over the loud-speaker system; that the screaming and hollering decidedly disturbed him and others who were there. (R. 190)

(b) H. E. Watts, in addition to the parts of his testi-

mony stated in the petition, testified: (R. 222 et seq.) that on that Sunday morning he was chairman of the hospitality committee; that he first saw the defendant standing on the stairs at the entrance to the foyer in front of the church, yelling in a very coarse, raucus voice to all the people as they came into the sanctuary, "come right in, folks, worship a segregated God in a segregated church." (R. 223) Mr. Watts asked him to stop but he continued for some time in that same coarse voice, the same statement to all members as they came in; finally Mr. Watts closed that door at the side entrance of the front foyer; Mr. Jones then went around to the front, the main entrance from Peachtree, and continued the same thing (R. 224); he continued for a while and then he sat down on the steps and discontinued that yelling; he then sat up, and one of the ushers just touched him on the elbow and Mr. Jones immediately dropped right down on the steps and sprawled out there and yelled, help, help; he stayed there for some time just laying there on the steps yelling; nobody was within 20 feet of him at that time. (R. 224) Mr. Watts then went inside the foyer, and the church service had begun, and while standing there in the foyer he heard this yelling again outside; Mr. Watts went outside again and "the same man was lying on the walkway" and yelling "help, help, police" which he continued for several minutes; this was on the church walkway, the church entrance, "not on the public sidewalk"; no one was within at least 20 feet of him at that time. (R. 225)

(c) Glenn Bailey testified that on the Sunday morning in question he was "in the main sanctuary" of the First Baptist Church, in his customary place, and he heard a man's voice hollering outside the church (R. 256); that

oftentimes things are heard within the church such as fire engines or an ambulance going by, but this particular noise was a little more disturbing.

(d) Fred W. Echols testified (R. 430 et seq.) that he was a member of the Hospitality Committee and was at the First Baptist Church that Sunday morning and saw Reverend Jones on the "flat area" between the sidewalk and the steps leading up to the main sanctuary, hollering "help, police" and "there was absolutely nobody around him at all and he was doing all this hollering." (R. 434-435)

(e) Lieut. W. K. Perry, of the City Police, testified (R. 437) that he drove or came to the vicinity of the First Baptist Church several times, on the Sunday morning in question; the first time he saw the defendant sitting on the steps in front of the church; the second time he was on the sidewalk in front of the church . . . standing . . . hollering pretty loud . . . he was shouting; the officer was in his car 60 or 70 feet back in the next block and could not understand the words he was shouting; no one was around the defendant; he did not see anyone put their hands on him or scuffle with him (R. 440); when the officer heard him hollering the officer started walking to the intersection, which was toward the First Baptist Church, "and he stopped his hollering" (R. 440); then the officer went back to his automobile.

Events of Sunday Evening

(f) Glenn Bailey testified as to the part that he saw on Sunday evening; that he first saw the defendant with three companions about 6:15 p.m., kneeling or the walkway outside the chapel entrance, in a position of

prayer (R. 263-264); that one of them went down the walk to the chapel entrance and examined the door, then came back to his companions (R. 265); then the group got up and went down the walk to the chapel entrance, then they all ran up the steps and through the chapel doors (R. 266); when they got inside the vestibule they sat down on the floor (R. 266); one of them stood up and leaned against one of the doors, reading aloud, while Jones "was sitting there saying nothing." (R. 270)

(g) Rev. J. A. Langley testified to events happening that Sunday evening, and to the defendant "blocking the passageway" at the side entrance to the church from Fifth Street (R. 191); he testified that a worship service was due to begin at 6:45 p.m., and he (Mr. Langley) arrived there between 6:30 and 6:45 and the defendant was "sitting in an entranceway leading into the church"; that this was an entranceway that people used for the evening service; that he spoke to the defendant and he got up; that he was trying to get the defendant not to continue the activity he was engaged in, but the defendant was adamant, impervious to the appeal that Rev. Langley made, and the defendant "sat back down, blocking the passageway." (R. 191)

(h) Fred W. Echols testified to events of the evening; that he saw the defendant sitting on the steps to the entrance of the chapel "from 6:30 on" (R. 431); that "there were a lot of people around"; that there were several people from the church I knew and there were several people from the church across the street" (R. 432). He described the arrival of two police officers, "and they talked to him for several minutes (R. 431);

then they helped him up or he got up, then he went limp; then the police officers took him by the arms, "under the arm-pits," with the defendant "kicking and hollering" and took him from the church entrance to the police car. (R. 431-433) There was "much commotion." (R. 432)

REASONS FOR NOT GRANTING THE WRIT

I.

Petitioner seeks to have the Supreme Court consider this statute as one curtailing his constitutional right of freedom of speech. But the case does not involve such question. First, the pleadings did not raise that issue. Second, the evidence in the case shows that the statute was not applied so as to deprive the defendant of his right to freedom of speech.

First, as to the pleadings, the demurrer alleged that the Georgia statute in question violated the due process clause of the Fourteenth Amendment in that "it is upon its face so *vague,* indefinite and ambiguous that said statute wholly fails to give the defendant adequate notice of the acts and conduct which constitute a violation of said statute." (R. 8-9) This was again asserted in his Motion in Arrest of Judgment. (R. 38) Neither of these pleadings asserted any claim that his right of freedom of speech or his right of advocacy was prohibited or curtailed by the statute. Also, the Supreme Court of Georgia in its decision (219 Ga. 848, 136 S.E. 2d 358) did not decide such question of violation of right of freedom of speech, but only the constitutional question presented by the pleadings, as to alleged vagueness of the statute.

Second, the evidence does not make a case of the

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statute being applied so as to prohibit or curtail defendant's right to freedom of speech. He went far beyond oral advocacy of his ideas. By his yelling and shouting, just outside the door of the church, while the service was in progress and prayer was taking place, he disturbed the divine worship on that Sunday morning. Then he went back to the same church that evening and carried his "disturbing" one step further, and sat down in the entranceway, blocking its passage. We have set forth in our *statement,* ante, much of this evidence, to show that he went far beyond the bounds of permissible advocacy.

The petition for writ of certiorari says, on page 11, that "It is clear that petitioner's purpose was to advocate ideas; namely, the evils of segregation and the immorality of Christians who exclude Negroes from worship." It seems equally clear that he determined to go beyond the advocacy of his ideas, and *disturb* the divine service which was in progress. If his purpose had been only to advocate and express his ideas peacefully, he need not have gone back the second time that Sunday evening. He had expressed himself on Sunday morning, rather forcefully, both in the vestibule and on the church steps and walkway, and he had not been arrested. The scene was evidently too mild, from his viewpoint. He therefore went back that evening, determined to get inside one of the doorways of the church and sit down on the floor and cause a "scene," hoping thereby to disturb and jolt the congregation more. And when some officers came and took him away, that Sunday evening, his falling limp and kicking and yelling, created a greater disturbance and apparently accomplished his purpose of going to the extreme of bringing about his arrest. This was not mere

"advocacy." And the statute has not been applied to curtail a citizens right of freedom of speech.

The Supreme Court has stated that it does not formulate a rule of constitutional law broader than is required by the precise facts presented by the record. *Garner* v. *Louisiana,* 368 U. S. 157, 82 S. Ct. 248 (1).

In *Bush* v. *Texas,* 372 U. S. 586, 590, 83 S. Ct. 922 (2), the Supreme Court said ". . . as a rule of consistent application, this Court has declined to anticipate a question of constitutional law in advance of the necessity of deciding it."

In *U. S.* v. *Spector,* 343 U. S. 169, 172, 72 S. Ct. 591 (6), the Supreme Court said: "When a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions. Rather, we refrain from passing on the constitutionality of a phase of a statute until a stage has been reached where the decision of the precise constitutional issue is necessary."

Gist of this Offense was Disturbing Divine Worship

On pages 12 and 13, the petition seeks to have the Supreme Court consider "different factual contexts." It is stated that if the petitioner had limited his protest to a peaceful demonstration outside the church, his activity would be constitutionally protected. We do not dispute this. He contends, however, that such a peaceful demonstration outside the church would be covered by the Georgia statute in question. This we do dispute. Certainly no such question is presented here. He was not prosecuted or arrested for a peaceful demonstration outside the church, and there is no reason to believe that

such a result would have taken place. In fact, the evidence shows the contrary. No arrest was made, or even threatened, for his "advocacy." The gist of the offense for which he was eventually prosecuted was the *disturbing* of divine worship, which he did by his shouting and by his sitting on the floor under the circumstances proven.

In *United States* v. *Raines*, 362 U. S. 17, 22, 80 S. Ct. 519 (4), the Court said: "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases."

The case which the petition cites in support of his effort to get the court to consider "other factual contexts" is *NAACP* v. *Button*, 371 U. S. 415, 432. But that was a case begun by a petition for declaratory judgment and injunction, covering the whole scope of a Virginia statute. In such a case, the Supreme Court considered all angles of the application of the statute in question, not just a case involving a trial and conviction on specific evidence.

In *Winters* v. *New York*, 333 U. S. 507, 509, 68 S. Ct. 665, cited on page 11 of the petition, the Supreme Court held a New York obscene literature statute violative of the Fourteenth Amendment as denying the right of freedom of speech. But it is pointed out on Page 509 of the decision that the validity of the statute on this very point was drawn in question in the State Court.

In *Edwards* v. *South Carolina*, 372 U. S. 229, 83 S. Ct. 680, which is relied upon and cited three times in the petition, the decision comments on the fact that the defendants were walking peacefully on the public sidewalk around the state house, demonstrating, "they were

convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." The statute under which they were convicted, and affirmed by the State court, was therefore held unconstitutional by the Supreme Court, saying, "The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views." (Page 237) A much different case is here presented, with the defendant's conduct being far from peaceful and on the property of the Church, and the gist of the Statute in question being the disturbing of divine worship.

In *Herndon* v. *Lowry,* 301 U. S. 242, cited three times in the petition, the Supreme Court was considering the validity of the Georgia inciting to insurrection statute against the allegation that said statute was unconstitutional as denying freedom of speech. The Supreme Court did not invalidate the statute from future use but held (P. 259) that "as applied to him (Herndon) the statute unreasonably limits freedom of speech and freedom of assembly" and (P. 261) that "the statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt." In the present instance we believe that the test should be applied in the same way, to the evidence in the trial, and to the statute *as applied* to the evidence in the case.

The petition, on page 11, refers to the phrase contained in the statute: "otherwise indecently acting." This phrase was stricken out of the indictment, on complaint of the defendant in his demurrer to the indictment, he

demurring to that particular language of the indictment for alleged "vagueness." (R. 12) The trial judge sustained this contention and struck that clause, leaving the balance of the indictment to stand, with its specific allegations. (R. 13)

The petition, on page 11, also refers to there being in this case "a contested factual dispute." In such a case, involving contested facts, the Supreme Court does not decide the credibility of the different persons, but will weigh the evidence from the standpoint of whether there was *any* evidence to authorize the conviction without doing violence to the constitutional provisions invoked. So, in *Edwards* v. *South Carolina,* supra, the Supreme Court held that there was *no evidence* showing that the accused did any more than peaceably express their opinions in marching upon the public sidewalk around the state house. (P. 237.)

Similarly, in *Wright* v. *Georgia,* 373 U. S. 284, 83 S. Ct. 1240, where the accused (playing basketball in a public park) were convicted under a breach of the peace statute, the decision says: "The record is devoid of any activity which a breach of the peace statute might be thought to punish." The petitioner in the case now at bar cannot say that the present record is devoid of any evidence that he disturbed divine worship by his acts and conduct at the First Baptist Church. Neither can he say that what the State proved he did was only indulging in constitutionally protected conduct.

Before leaving this division of our Response, we wish to point out that Disturbing Religious Worship has been recognized as an offense since the time of the common-law; that many cases of prosecutions for this offense are

referred to in the text and annotations in *18 Corpus Juris 1388* et seq., and *27 C. J. Secundum 819* et seq., and that the following case appears cited on page 1389 of *18 Corpus Juris,* with the following quotation from that early case: *U. S.* v. *Brooks,* 24 F. Cas. No. 14,655, 1 Cranch C.C. 427:

> "The principles upon which the disturbance of public worship becomes an offense at common law are these: Every man has a perfect right to worship God in the manner most conformable to the dictates of his conscience and to assemble and unite with others in the same act of worship, so that he does not interfere with the equal rights of others. . . . And whenever the injury is common to an indefinite number of persons, so that no one has a greater right to sue than another, the private injury is merged in the public wrong, and becomes the subject of public prosecution. . . ."

This inalienable right became one of the cornerstones upon which this nation was founded, and its protection has been recognized as just as important to the public welfare as the protection of the right of freedom of speech. No one, therefore, can justly claim "freedom of speech" as an answer to the acts and conduct proven against the accused in this case.

II.

Petitioner's Fourteenth Amendment right to due process of law was not violated by the trial judge overruling petitioner's motion to disqualify him in this case.

The Motion to disqualify (R. 5 to 7) did not set forth any sufficient facts showing that Judge Pye was disqualified to try the case. In the introductory para-

graph it is claimed that the judge has made repeated denunciations of the Negro race in general and this defendant in particular. This would indicate that it was drawn for use in the trial of a Negro. This defendant was not a member of the Negro race.

In the next paragraph, numbered 2, the Motion lists eight items as showing that the judge had a prejudicial interest against the defendant. None of these items show any unconstitutional or disqualifying bias against this defendant.

Under the title "Judges" in *30-A Am. Jur.*, pages 88-89, the text says:

> "Bias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case. Hence, a judge is not disqualified from presiding at a criminal trial by the fact that he looks with abhorrence on the commission of crimes, or because he belongs to an organization for the suppression of crime, or participated in movements to enforce the law on particular subjects."

In *Ryan* v. *United States*, 99 F. 2d 864 (10), (8 C.C. 1938), the court held "that a judge, to be disqualified, must have a personal bias or prejudice against the party or in favor of an opposite party," and that "judicial rulings cannot ordinarily be made the basis of a charge of bias or prejudice." In that case certiorari was denied, 306 U. S. 635, and rehearing denied, 306 U. S. 668. The *Ryan* decision, on page 871, distinguishes *Berger* v. *United States*, 255 U. S. 22 (which is cited in the present petition), and points out that the disqualifying biased statements of Judge Landis in the *Berger* case "were made against a class of which the defendant was a member."

The disqualification referred to in the Federal court cases would be based, of course, upon the Federal statute. But in a case like the present, where the alleged disqualification of a State court judge is under consideration by the United States Supreme Court it would have to be such as to deny due process of law to the accused. This distinction was recognized in *Re Murchison,* 349 U. S. 133 (cited in the present petition), in which the Supreme Court held, by 6 to 3, that the Michigan judge who had sat as a one-man grand-jury, out of which contempt charges arose, was disqualified from trying a contempt case against a witness who had testified to him in such grand-jury.

More recently, in *Ungar* v. *Sarafite, Judge,* 376 U. S. 584, 84 S. Ct. 841, 847, the Court had another such question up from a New York court and held, 6 to 3, that the New York judge who had tried a certain criminal case was not disqualified from hearing contempt charges against a witness, or at least that the witness was not deprived of his constitutional right to a fair trial and due process of law. The majority opinion discussed the *Murchison* case, supra, and distinguished it.

In *Eisler* v. *United States,* 170 F. 2d 273 (Ct. App. D.C. 1948), it was held (Page 278) that "Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not . . . within the purview of the statute." And the decision pointed out that the affidavit to disqualify "must state facts and reasons which tend to show personal bias and prejudice . . ." (citing *Berger,* supra, on this point). This strongly supports our position that although the

motion to disqualify in the present case alleged that the judge was prejudiced against the defendant, the eight recitals of Judge Pye's alleged actions and statements did not show any personal bias or prejudice against this defendant. In the *Eisler* case the certiorari was dismissed, 338 U. S. 883.

The defendant was not a member of the race which the petition alleged Judge Pye was prejudiced against; he was not even indicted and charged with a violation of the Act of 1960 (Ga. Laws 1960, page 142), (known as the anti-trespass law), which was referred to repeatedly in items "g" and "h" of the Motion to Disqualify, but he was charged with an entirely different offense, disturbing divine worship. The Motion to Disqualify, in par. "d," said that ordinarily the Grand Jury would be empaneled and charged by the presiding judge. Judge Pye *was* the presiding judge at that time.

The Motion to Disqualify said that Judge Pye had called for a list to be furnished by the Chief of Police showing "the names of this and other defendants who had been charged with misdemeanor offenses relating to peaceful protest against discriminatory practices, policies, customs and acts by private persons, public officials and others as relates to the rights and privileges and immunities of Negro citizens of the City of Atlanta, Fulton County, Georgia." This indictment against defendant did not relate to any right or privilege or immunity of Negro citizens. No one has claimed, yet, that Negro citizens have any legal "right" to join or participate in worship in white churches. Not even this defendant claimed that. His counsel claim that the defendant was advocating "the evils of segregation and the immorality,

of Christians who exclude Negroes from worship," but that presents a moral question, not a legal question. So, the letter of Judge Pye to the Chief of Police, referred to in item "a" of the Motion to Disqualify, did not include any reference to the charge upon which this defendant was indicted. This defendant was not included in any of the references or items of conduct or acts alleged against Judge Pye. The Motion was insufficient on its face, and required no hearing.

In *Foster* v. *Medina*, 170 F. 2d 632 (2 C.C. 1948), it was held that the affidavit of personal bias and prejudice filed against Judge Medina presiding in the trial was insufficient, in that "In none of the three excerpts from the colloquy do the quoted remarks of Judge Medina 'give fair support to the charge' of prejudice." (Cert. denied, 335 U. S. 909.)

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the writ of certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, J. Walter LeCraw, of counsel for the State of Georgia, respondent in the foregoing case, certify that I have this day served copies of the foregoing Brief of Respondent in Opposition to petition for writ of certiorari upon Petitioner, by depositing in the United States Post Office in Atlanta, Georgia, two copies of same in an envelope addressed to Jack Greenberg, Attorney, 10 Columbus Circle, New York, New York, 10019, and two copies of same in an envelope addressed to Donald L. Hollowell and Howard Moore, Jr., Attorneys, 859½ Hunter Street, N.W., Atlanta, Georgia, 30314, counsel of record for petitioner, with sufficient first class postage affixed thereto.

This October.....1964.

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit